IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 24TH AUGUST 2007 / 2ND BHADRA 1929

FAO.No. 305 of 2006()

AGAINST THE ORDER DATED 06/11/2006 IN IA 1205/2006 IN OS.117/2005 OF PRINCIPAL SUB COURT,ALAPPUZHA

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APPELLANT/PETITIONER/1ST DEFENDANT:

ALANKAR JEWELLERS, ALAPPUZHA
REPRESENTED BY P.S. LALU, CHEMPAKA BHAVANAM,
MULLACKAL VILLAGE, ALAPPUZHA.

BY ADV. SRI.R.AZAD BABU

RESPONDENTS: COUNTER PETITIONERS:
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1. ELSAMMA JOHNY, KANDATHIPARAMBIL HOUSE,
CHERTHALA NORTH VILLAGE, REPRESENTED BY
POWER OF ATTORNEY HOLDER, LALY SUNNY,
KANDATHIL, P.H. WARD, ALAPPUZHA.

2. LALI SUNNY, KANDATHIL,
P.H. WARD, ALAPPUZHA.

3. P.S. GANESH, ALANKAR JEWELLERS,
THIRUVALLA.

4. SUDHA MURUGAN,
ALANKAR JEWELLERS, CHENGANNUR.

BY ADV. SRI.C.J.JOY
SRI.KURIAKOSE G.THEKKEL

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 24/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.R.RAMAN & K.HEMA,JJ.

FAO.NO.305 OF 2007

Dated this the 24th day of August, 2007

JUDGMENT

Raman, J.

This is an appeal against the order passed by the Principal Subordinate Judge's Court,Alappuzha in I.A.No.1205 of 2006 in O.S.No.117 of 2005. Petitioner is the first defendant. The suit is a money claim. The suit was listed for trial on 12.8.2006, on which day none of the defendants were present. The court below passed an ex parte decree. Thereupon the first defendant, who is the appellant herein preferred the present I.A seeking to set aside the ex parte decree on the ground that on the date on which the case was posted for trial, he was indisposed and was taken to the T.D.Medical College Hospital, Alappuzha for treatment. In such circumstances, he could not contact the counsel, nor to present the court. According to him, the doctor advised him to take rest.

In the counter affidavit filed by the plaintiff, she denied the averments made in the affidavit and also disputed the bonafides of the contentions raised. Despite the said denial by the plaintiff, she did not chose to enter the box and give evidence in support of her

contention. However, the first defendant produced an O.P ticket issued by the T.D. Medical College, Alappuzha which would on perusal show that the petitioner was admitted as an outpatient and the doctor has prescribed certain medicines including vertin and other tablets. The O.P ticket issued would also show that the petitioner was advised rest. But there is a correction in the date in the O.P ticket issued. The date is corrected as 11. The court below raised a doubt about the genuineness of the O.P ticket. However, allowed the application on terms by directing the appellant herein to pay an amount of Rs.10,000/- by way of cost as condition for setting aside the ex parte order. The said order is under challenge in this appeal.

We have heard the parties. According to learned counsel for the appellant, in the absence of any specific challenge to the O.P ticket issued by the T.D.Medical College, he did not chose to examine anybody including the doctor who treated him. But learned counsel for the respondents submitted that they have denied the bonafides of the contentions raised and in such circumstances, the appellant should have given evidence in support of the plea raised in the petition. We find that along with the counter affidavit supporting the petition for seeking to set aside the ex parte decree, the appellant had produced the O.P ticket. The genuineness of the

O.P ticket as such was not challenged by raising any contention regarding the same in the counter affidavit, though it is true, the bonafides of the contention that the appellant was indisposed was denied. In such circumstances, we are not fully satisfied about the plea raised by the appellant. However, the fact remains that the O.P ticket issued would show that there was some ailments suffered by the appellant on the date on which the case was posted. If so, while fixing the terms for setting aside the ex parte decree, the court below should have shown some consideration and reduced the cost. In such circumstances, we direct that instead of payment of Rs.10,000/- ordered by the court below, the appellant shall pay an amount of Rs.5,000/- towards the cost within two weeks from today. On such condition the ex parte decree passed by the court below will stand set aside and the order impugned in this appeal stand modified to the above extent. The appeal is allowed.

Being a money decree and the suit is of the year 2005, the court below shall dispose of the suit as expeditiously as possible, at any rate, within a period of six months from today.

P.R.RAMAN, JUDGE

K.HEMA, JUDGE

vgs.